DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

AEG
Docket No. 5432-99
29 November 2000

Mr [redacted]

Dear Mr. [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 28 November 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary evidence considered by the Board consisted of your application, together with all material submitted in support thereof, and applicable statutes, regulations and policies. The Board was unable to obtain your naval record and conducted its review based on the documentation you submitted with your application.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The board found that you first enlisted in the Navy on 6 February 1979. During the next 12 years, you served in an excellent to outstanding manner as evidenced by your performance evaluations, promotion to electronics technician first class (ET1; E-6), qualification in submarines, and the award of a certificate of commendation and a Navy Achievement Medal.

In 1991 you were seriously injured in an automobile accident, resulting in a series of medical boards. However, in 1993, you were found fit for full duty. Your evaluations indicate good performance during and after this period. On 13 December 1993, you reenlisted for six years. In 1994, you received another Navy Achievement Medal.

On 7 August 1995 a Navy drug screening laboratory (NDSL) reported to your command that a urine sample you submitted on Tuesday, 25 July 1995, during a random urinalysis, had tested positive for

methamphetamine. It was later determined that the methamphetamine was quantitated at a level of 3342 nanograms per milliliter (ng/ml), above the cutoff level for a positive result of 500 ng/ml. Subsequently, the urinalysis coordinator executed a signed statement to the effect that the urine samples were collected, stored and shipped to the drug screening laboratory in accordance with the governing directive. On 4 October 1995 the commanding officer (CO) initiated administrative separation action against you by reason of misconduct due to drug abuse. Shortly thereafter, you elected to have your case heard by an administrative discharge board (ADB).

On 2 November 1995 a medical board submitted its report, noting your prior accident and medical boards. In its report, the medical board opined that your condition had worsened to some extent, and recommended a period of limited duty. There is no indication in the documentation available to the Board as to what, if any, action was taken on this recommendation.

On 2 November 1995 a licensed polygraph examiner in the civilian community opined that you were being truthful when you denied using methamphetamine in the thirty-day period prior to the urinalysis of 25 July 1995. However, on 9 January 1996, the Naval Criminal Investigative Service (NCIS) administered a polygraph examination that found deception in your denial of methamphetamine use during the week preceding the urinalysis.

On 7 December 1995 a forensic toxicologist submitted a letter to your counsel in which he noted that he had examined the relevant documentation concerning the positive urinalysis, and stated as follows:

> There are several possible explanations of how the urine tested positive for methamphetamine. One possible explanation is that someone placed methamphetamine into the urine bottle prior to collection or into the urine after the collection. Methamphetamine is readily soluble in urine and could produce the finding of methamphetamine as seen in this specimen. Given that approximately 100 ml. of urine was collected, only several small crystals of a size similar to table salt would be required to be placed into the urine bottle to result in the analytical finding in this case. Analytically less than one milligram (0.001 gram) would be required to be placed into the bottle to produce the reading found in this case.
>
> Another possibility is that the person who provided the urine specimen ingested methamphetamine without consciously knowing that a drug was being ingested. There are several possible reasons that the person providing the . . . urine specimen would not have been aware that methamphetamine was taken into the body and subsequently excreted in the urine specimen. Methamphetamine is available as a powder or pill form that is readily soluble in most liquids and could be

consumed with normal food ingestion. Once the methamphetamine was dissolved in the liquid it would be unnoticeable (no odor or color) to the individual. It is very difficult to estimate the amount of methamphetamine that would have to be ingested to result in the amount found in the urine. Methamphetamine excretion is very dependent on the urine acidity and the urine acidity varies with the types of food or drinks that are consumed. In acid urine up to 70% of the dose of methamphetamine may be excreted in the urine within 12 hours of ingestion. Only a small amount of methamphetamine would be required to be ingested under these conditions to result in the laboratory finding of this case. The dose of methamphetamine would be small enough that the individual would not have experience (sic) symptoms that would have been noticeable or caused alarm to the individual.

On 19 February 1996 you were reexamined by the civilian polygraph examiner. The examiner's report of that examination reads, in part, as follows:

Throughout each polygraph chart, there were significant and consistent physiological reactions, which are usually indicative of deception, each time (you) answered "NO" to the following relevant test questions:
Did you use any form of methamphetamine within one week prior to the urinalysis?
Did you use any illegal drugs within one week prior to the urinalysis?
Have you used any medications, drugs or alcoholic beverages, in the last 24 hours?

OPINION: Based on these results, it is my opinion that DECEPTION WAS INDICATED when the examinee answered the relevant test questions.

COMMENTS: His charts today were completely inconsistent with the charts he ran on his November polygraph exam. As you remember, he admitted to me that he had taken some prescribed Tylenol 3 sometime during the night before his exam. This time he insisted that he hadn't taken any medication/drugs/or alcohol within 24 hours of this test. Obviously, I don't know for sure what caused the discrepancy between the first exam and this one. However, there are several possible reasons:
1. He is actually being deceptive but the Tylenol 3 taken before the first exam masked deceptive reactions.
2. The fact that he showed deception on the NCIS exam has played games with his mind, causing him to be extremely sensitive to all of the relevant questions.
3. The fact that he blames the Navy for trying to railroad him (i.e. the Navy allegedly opened an investigation after they scheduled him for the advancement exam after revoking his security clearance.)

The examiner concluded his report by stating that "(your) charts cannot support testimony on his behalf."

The technical director of the NDSL submitted an affidavit on 20 February 1996 which stated, in part, as follows concerning innocent ingestion of methamphetamine:

> It is possible to obtain illegal MET (methamphetamine) (e.g. ICE) in a powder form. This powder could be placed in someone's food or drink. If the quantity of drug is sufficient or if the urine sample is obtained within a certain time period after ingestion, that urine sample would be positive for MET.
>
> MET is detectable for 2 to 3 days after normal use. If a person is a chronic user or has taken a larger than normal dose then detection may extend to four days. The quantitation of 3342 ng/mL is not a high or low value. Therefore, it is difficult to address the question of unknowing ingestion without more information, such as, amount consumed or time of ingestion prior to urine sample collection. As to whether any effects would of (sic) been detectable depends on the quantity ingested and the situation under which the drug was consumed . . .

Your ADB met on 21 February 1996. Initially, the recorder to the ADB and your counsel questioned the members of the ADB concerning any possible grounds for challenge. Both counsel introduced a considerable amount of documentary evidence. Your counsel introduced the first report from the civilian polygraph examiner, but not the second report. he also introduced 32 Code of Federal Regulations (CFR) § 62.4, which states, in part, that it is the policy of the Department of Defense to "(t)reat or counsel . . . drug abusers and rehabilitate the maximum feasible number of them," and "(d)iscipline and/or discharge . . . those . . . drug abusers who cannot or will not be rehabilitated . . ."

The only witness for the government was the examiner who administered the NCIS polygraph examiner, who went over the applicable procedure. You then testified under oath and briefly recapped your Navy career, physical problems, and the circumstances surrounding the urinalysis of 25 July 1995. You then testified as follows about his activities on the Sunday and Monday nights immediately prior to the urinalysis:

> . . .(E)arly Sunday evening . . . (I) went out to a restaurant for dinner . . . I. . . went out to some . . . places (and) I had two to three beers while I was playing pool.
>
> Monday night, my wife was staying in Massachusetts so I went to my room and laid down fo about an hour before driving to meet my wife. We went out for dinner around

> 10:00 PM. I headed back to Groton, when I got back . . . I was pretty much awake so I stopped to have a beer and decided to shoot some pool.

When counsel asked you whether, on either night, you were ever "in a position for someone to put something in your drinks," you replied as follows:

> I would like to think that the place I was at would not have done that, but that could be the only explanation if I did get up to use the restroom at a place while I was throwing darts.

When counsel asked you, "are you guilty of this crime," you replied, "No, sir."

You were then cross-examined by the recorder, and the following colloquy ensued:

> REC: (Recorder): On what dates are you talking about leaving the drinks unattended?
>
> RESP: (Respondent; you): 23 July 1995
>
> REC: Who were you at the bar with?
>
> RESP: No one that I knew.
>
> REC: So there was no one in the bar that knew you who wanted to ruin your career?
>
> RESP: No.
>
> REC: Did you pay the civilian polygraph (examiner); and if so, how much did you pay him?
>
> RESP: Yes, sir. About $250.00.
>
> REC: Did you have to pay him more if he had to come here today to testify?
>
> RESP: Yes, sir.
>
> . . .
>
> REC: . . . (Y)ou knew that (this) polygraph could not be used against you if he said that you were lying, it would just be thrown away, it would not be used at an (ADB) or anything else, isn't that true?
>
> RESP: Yes.

REC: In fact, you had a lot more to lose from the NCIS polygraph than you did from (the civilian) polygraph, didn't you?

RESP: Yes.

Your counsel then introduced sworn testimony or stipulations of expected testimony from 11 of your co-workers or superiors, all of whom attested to your outstanding performance of duty and character, and stated that they had no knowledge of any drug abuse on your part.

The ADB then closed for deliberations. After about 50 minutes, the ADB reconvened and the senior member announced unanimous findings and recommendations that you had committed misconduct due to drug abuse, and should be separated with an honorable discharge.

On 28 February 1996 your counsel submitted a statement of deficiencies to the CO concerning the ADB in which he alleged that given the statements to the effect that methamphetamine can be unknowingly ingested, the evidence was insufficient to establish by a preponderance of the evidence that you knowingly used drugs. Counsel also contended that since you were an excellent candidate for rehabilitation, the record did not warrant separation. Finally, counsel maintained that if separation was warranted, such action should be taken due to your medical condition and not due to misconduct.

By letter of 2 March 1996 the recorder replied to counsel's contentions as follows:

Unknowing Ingestion . . . (Counsel) stated that the evidence was insufficient to establish by a preponderance of the evidence that (Petitioner) knowingly used methamphetamine. He further alleged that "(t)here is absolutely nothing to suggest that (you) in any manner used drugs. . . "

In paragraph 37 of Part IV to (the *Manual for Courts-Martial*) . . . section C(10) states that:

> Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

. . . In this case, not only was the . . . controlled substance in question . . . found in (your) body, the (ADB) considered the additional circumstantial evidence of (your) knowingly ingesting the drug. (You were) afforded an NCIS polygraph test where he was asked whether he abused

methamphetamine or any other illegal drugs during the week in question. When (you) denied that he had abused drugs, the polygraph machine indicated that (you were) being deceptive in his answers. Clearly, the (ADB) had more than sufficient evidence to justify their unanimous finding of misconduct in this case.

Discharge Not Warranted by Service Record. . . . (Counsel) states that a discharge of any kind is not warranted by (your) service record, due to his many years of service to the Navy. (Counsel) accuses the members of the (ADB) of not considering retention in this case.

During the *voir dire* of the members of the (ADB), at the beginning of the (ADB), both (counsel) and I questioned each member at length about their possible biases concerning the retention of drug abusers in the Navy. Each member agreed that they could at least consider retention in an (ADB) involving drug abuse.

Contrary to (counsel's) argument, (you) would be a poor candidate for drug rehabilitation since he has never taken responsibility for his actions and has continued to deny he has ever abused drugs. Until he can admit that he is a drug abuser, efforts on his behalf for his rehabilitation will be futile.

The recommendation of the (ADB) itself demonstrates that the (ADB) did carefully consider (your) years of exemplary performance . . . (P)aragraph 3630620.2(a) of (the *Naval Military Personnel Manual*) . . . states that the appropriate characterization of service in a drug abuse case is "Normally Other than Honorable." In this case, the (ADB) took the extraordinary step of recommending an Honorable Discharge despite the fact that (you) not only abused methamphetamine but lied about it under oath.

. . .

Request for Medical Discharge. . . . (Counsel) requests . . . that (you) be permitted to separate from the Navy under a medical discharge . . . Paragraph 2072(a) of (Secretary of the Navy Instruction 1850.4C states that disability separations are superseded by disciplinary separations unless the Director of the Naval Council of Personnel Boards . . . specifically directs otherwise.

By letter to your counsel of 22 March 1996, the CO concurred with the findings and recommendations of the ADB and stated that he had no authority to direct a medical discharge given the ongoing administrative separation proceeding. On 29 March 1996 the CO forwarded the proceedings of the ADB, along with counsel's statement of deficiencies and the recorder's response, to the Chief of Naval Personnel (CNP) for final action. On 23 April

1996 CNP directed discharge in accordance with the recommendation of the ADB. Accordingly, on 24 May 1996, you were honorably discharged by reason of misconduct after slightly more than 17 years of service.

The Board carefully considered your contentions that the evidence did not show that you used drugs; that even if it did, the policy set forth in 32 CFR § 62.4 mandated rehabilitation and not discharge; and that if separation was warranted, it should have been by reason of physical disability and not misconduct. However, the Board concluded these claims were without merit for the reasons set forth in the quoted portion of the recorder's excellent letter of 2 March 1996. Concerning your claim of innocence, the Board also noted that this contention is at least somewhat undercut by the civilian polygraph operator's evaluation of 19 February 1996, in which he opines that you may have been deceptive in your denial of illicit drug use. Additionally, the Board concluded it is not feasible to rehabilitate and retain an individual such as yourself who used drugs while in a position of leadership as a senior petty officer since someone in such a position must set a good example for subordinates, and is rightly held to a higher standard of conduct. Finally, although you allege you should have been separated for physical disability and not for misconduct, the most recent medical board report of 2 November 1995 did not recommend separation, but only a period of limited duty.

The Board also rejected your contention that discharge was improper because no drug evaluation was accomplished as required by enclosure (7) to OPNAVINST 5350.4B. That enclosure to the directive states that after identification of a confirmed drug abuser, "prompt screening will determine whether the member can and should be retained." Appendix A to the enclosure requires a written evaluation to determine then nature and extent of abuse, the individual's potential for further service, and the level of counseling or treatment needed. The CO is to use this evaluation to decide whether to process the individual for separation. When it was issued with OPNAVINST 5350.4B, in September 1990, the Appendix A was clearly designed to be a "road map" for the CO's use in deciding whether separation processing or retention was appropriate in given case. However, the February 1992 issuance of NAVADMIN 18/92 obviated the need for such guidance since it mandated separation processing for all drug abusers. Therefore, even if no such evaluation was performed in your case, the CO did not have to decide whether to process you for separation and there was no need for an evaluation prior to such action.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board.

In this regard, it is important to keep in mind that a presumption of regularity applies to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Copy to: Mr. Greg D. McCormack